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SHOULD ONLY PHARMACISTS HOLD PECUNIARY INTERESTS IN A PHARMACEUTICAL BUSINESS? ATTORNEY GENERAL (NSW) v NOW.COM.AU PTY LTD [2008] NSWSC 276

The New South Wales legislature's policy of authorising only registered pharmacists to hold pecuniary interests in a pharmaceutical business is a component of Australian public health policy that accords with foundational principles and virtues of health law and bioethics. The case of Attorney General (NSW) v Now.com.au Pty Ltd [2008] NSWSC 276 considered what constitutes a pecuniary interest in this context, and how this should best be deduced from facts that may be contentious.

INTRODUCTION

The judgment in *Attorney General (NSW) v Now.com.au Pty Ltd* [2008] NSWSC 276 (*NPL*) held that ownership of a pharmacy by Sydney Drug Stores Pty Ltd (SDS) and its parent corporations constituted a pecuniary interest in the “business of a pharmacy” and therefore breached s 25 of the *Pharmacy Practice Act 2006* (NSW) (the Act).

The *Pharmacy Practice Act 1964* (NSW) was repealed in 2006 and the *Pharmacy Practice Act 2006* (NSW) now operates in its place.¹ Those provisions mandating that only pharmacists have a pecuniary interest in a pharmaceutical business have been retained in s 25 of the 2006 Act.

This column explores the bioethical and jurisprudential foundations of the *NPL* case and discusses the social implications in Australia of restricting pecuniary interests in the “business of a pharmacy” to pharmacists.

THE FACTS AND JUDGMENT

In March 2006, a pharmacist, Mr Brown, transferred his ownership of SDS, which wholly owned a pharmacy, to Coles Myer Ltd (Coles Myer), such that Coles Myer acquired all of SDS's share capital (at [18]). Coles Myer was a wholly owned subsidiary of Wesfarmers Ltd (Wesfarmers) which was a public company (at [1]-[8]). Mr Brown and other pharmacists had administrative and professional “charge” of the pharmacy (at [21]). On the other hand, Coles Myer managed SDS financially, as indicated by Coles Myer's annual report, the Coles Myer Board Governance Charter and management of its legal issues (at [22]-[26]).

The plaintiff Attorney-General of New South Wales contended that ownership of SDS by Coles Myer constituted a breach of s 25(1) of the Act, which provides:

A person (not being a pharmacist), a corporation or a body of persons unincorporated shall not carry on, as owner or otherwise, the business of a pharmacist in a pharmacy or otherwise have a pecuniary interest, direct or indirect, in the business of a pharmacist carried on in a pharmacy.

The “business of a pharmacy” is defined in the Act as:

the business of an apothecary or a chemist, pharmaceutical chemist, pharmacist, pharmacist, druggist, homoeopathic chemist, dispensing chemist or dispensing druggist in which the dispensing and

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¹ *Pharmacy Practice Act 2006* (NSW), s 157.

compounding of prescriptions for any substance specified in the Poisons List proclaimed under section 8 of the *Poisons and Therapeutic Goods Act 1966* occurs.²

“Pecuniary interest” is similarly defined in the Act:

a direct or indirect monetary or financial interest and includes:

- (a) a proprietary interest (including a proprietary interest as a sole proprietor, partner, director, member or shareholder, or trustee or beneficiary).

A pharmacist is “registered” by her or his board provided the pharmacist has been educated as a pharmacist and is determined to be competent in practice, as judged by peers on the Pharmacy Board.³

These provisions implied, in the view of Young CJ, that a non-pharmacist must not have a direct or indirect monetary or financial interest in the dispensing or compounding of prescriptions for substances specified in “the poisons list”. Young CJ concluded that a pecuniary interest must be more than a proprietary interest and involve a degree of active involvement and control in the “business of pharmacy” (at [49]). This was because, he held, a mere shareholder “does not have any legal or equitable interest in the assets, including agreements of the company”.⁴ That is, SDS did not necessarily have a pecuniary interest in the “business of a pharmacy” by virtue of being a shareholder (at [67]).

Nevertheless, Young CJ also concluded that as an active controller of the business, SDS had a pecuniary interest in the “business of pharmacy” (at [69]). He also found that “it is a question of fact and degree as to whether in any particular case a person who is involved in arrangements with a pharmacy business does have a pecuniary interest” (at [69]). The conclusion was that SDS could be deemed to have a pecuniary interest in the “business of a pharmacy” for the purposes of the Act, due to the control it actually exercised over the pharmacy, as implied by the evidence submitted.

WHY ONLY PHARMACISTS?

Young CJ’s discussion focused on the nature of an interest, from which it was concluded that a pecuniary interest in the business of a pharmacy requires not just receipt of a financial benefit but also “effective control” in the business of a pharmacy (at [69]).

In the Second Reading Speech for the Act, the Parliamentary Secretary, Paul McLeay MP, on behalf of Carmel Tebbutt, stated that the philosophical underpinnings of the Bill were designed to protect the public interest in restricting pharmacy ownership to registered pharmacists.⁵ The Explanatory Memorandum of the relevant Bill did not expand on this directly, but did note that pharmacists are able to hold their pecuniary interest via a corporate structure.⁶

Consequently, reference to ownership within the Act is specific to pecuniary interests in the “business of the pharmacy”, and does not relate to non-pharmaceutical business. Furthermore, there is scope within the Act for pharmacy ownership by a corporation, provided the pecuniary interests remain in the hands of a registered pharmacist.

In *Chappuis v Filo* (1990) 19 NSWLR 490, the New South Wales Court of Appeal clarified when a business conducted within a pharmacy becomes a pecuniary interest in the business of a pharmacy. However, there was disagreement on the effect that business size would have on a pecuniary interest.⁷ As smaller size will result in greater confluence, it is therefore logical to conclude that pecuniary interest incorporates an element of control, a conclusion restated several times in *Chappuis* (at 499-503).

² *Pharmacy Practice Act 2006* (NSW), s 4 (Definitions).

³ *Pharmacy Practice Act 2006* (NSW), s 8.

⁴ *Re Webster* (1975) 132 CLR 270 at 287 (Barwick CJ).

⁵ New South Wales Legislative Assembly, *Parliamentary Debates*, Second Reading Speech, *Pharmacy Practice Act 2006* (NSW) (11 May 2006) pp 1, 2 (Hon John Aquilina).

⁶ *Pharmacy Practice Act 2006* (NSW), Explanatory Note (g).

⁷ Kirby P contended that there is increased possibility in gaining a pecuniary interest in the business of a pharmacist, by a non-pharmacist, if the business is small. Priestley and Handley JJA disagreed with Kirby P, that conducting a non-pharmaceutical business in the same geographical, albeit small, proximity did not encroach on the pharmaceutical business.

In *NPL*, Young CJ held that to establish a pecuniary interest, a legal right does not have to exist, but that “effective control” is all that is necessary, whether directly or via an intervening entity, which nevertheless does not affect the exercise of the control (at [74], [75]).

Young CJ justified this on the basis that if the legislation is intended to protect the public interest, then effective control and not just legal right should be analysed, as this is necessary to uphold Parliament’s intention (at [6]). This is logical, assuming that any entity is able to wield power extraneous to its legal rights.

It is well recognised that a pecuniary interest requires ability to exercise control. Commonly, the regulation of pecuniary interests so as to protect the public interest has arisen as a legal issue in administrative and judicial decision-making. In each instance the office-holder was able to enhance their personal finances via the control they had in their decision-making capacity, and thereby were found to have a pecuniary interest.⁸

Young CJ referenced a number of criminal law cases, in which the law is intended to protect the public. In each of these cases an effective control test was utilised in spite of the accused not having personal possession or any legal right (at [74]-[75]).

The effective control test is an appropriate test to deduce a pecuniary interest in a pharmaceutical business, as the purpose of these regulations is to protect the public interest.⁹ The merits in regulating pecuniary interests in the “business of a pharmacy” are discussed below.

SHAREHOLDING AS A PECUNIARY INTEREST

As discussed, the Act does not prevent ownership by a non-pharmacist in a business conducted by a pharmacy, provided there is no pecuniary interest in the business of a pharmacy. As alluded to by Young CJ, this may be possible via a non-controlling shareholding in a corporation which owns a pharmacy as an asset, because the nature of a corporation is the separation between management of the assets and ownership of its equity.¹⁰

A shareholder in a company has a right to receive dividends. However, the value of these dividends is at the discretion of management and only available from the declared profit of a company.¹¹ This right provides financial *benefit* to the shareholder, but does not provide an “interest”.

Shareholding also provides the following powers:¹²

- the right to receive notice of meetings of members;
- the right to attend, speak at and demand a poll (or ballot) at shareholder meetings;
- the right to elect and remove directors; and
- the right to vote at shareholder meetings.

These rights allow shareholders to be able to select management of a corporation, and thereby indirectly control the corporation, but a single shareholder is not able to exercise any control over management unless that shareholding is large enough to select management in and of itself, regardless of how other shareholders vote.

It is, in fact, by virtue of the separation of the ownership of assets and the management of assets that a company is formed.¹³ That is, the financial rights do not create a legal interest in a company’s assets, but only a financial benefit as determined by management.

⁸ For administrative decision-making see *Brown v Director of Public Prosecutions* [1956] 2 QB 369; *Rands v Oldroyd* [1959] 1 QB 204; *Re Wanmaker and Patterson* (1973) 37 DLR (3d) 575; *Downward v Babington* [1975] VR 872. For judicial decision-making, see Thiagarajan P, “Disqualification of Judges for Pecuniary or Proprietary Interests in the Outcome of Litigation” (2003) 38 AIAL Forum 13.

⁹ *Chappuis v Filo* (1990) 19 NSWLR 490 at 498-501 (Kirby P).

¹⁰ Redmond P, *Companies and Securities Law Commentary and Materials* (5th ed, Thomson Reuters, Sydney, 2009) at [2.55].

¹¹ Redmond, n 10 at [9.365]-[9.390].

¹² Redmond, n 10 at [3.1].

¹³ Redmond, n 10 at [2.55].

Young CJ's citation of pecuniary interest discussions in previous case law, in which there is no legal right to management of an asset, but there is an issue of effective control, is an appropriate analogy for the pecuniary interest of a shareholder in the assets of the company (at [52]-[57]). Nevertheless, a pecuniary interest may be deduced from the financial benefit in conjunction with any significant degree of voting power, which is able to exercise adequate control in determining management of the corporation. Young CJ's conclusion (at [78]) that SDS's pecuniary interest is deduced from the conjunction of exercising control over management in the "business of a pharmacy" and receiving money from that pharmacy, appears to be correct.

SOCIAL IMPLICATIONS OF PHARMACY BUSINESS

The effective control test ensures that only registered pharmacists conduct pharmaceutical businesses. The following discusses what pharmaceutical business entails, and the importance of only registered professionals conducting such businesses. The conducting of pharmaceutical businesses includes not only the sale of various goods and services supplied by the pharmacy, but also the counselling of patients to ensure correct diagnoses and detailing how various substances should be taken and the expected effects.¹⁴ In *Chappuis v Filo Kirby P* held (at 498-501) that the retailing of non-pharmaceutical goods was included within the "business of a pharmacy", when that retailing supports the pharmaceutical business, and consequently, a non-pharmacist is barred from controlling any aspect of a pharmaceutical business.

Also, as pharmacists are positioned to ensure appropriate medication is provided, both in relation to a specific ailment and in accordance with the specific characteristics of a patient, the *Fourth Community Pharmacy Agreement* affirmed that pharmacists provide essential counselling service for the administration of medications.¹⁵ The Pharmacy Guild of Australia has classified registered pharmacies as "medicine experts, providing professional advice and counselling on medications, including their use and effects, as well as general health care".¹⁶ The combination of counselling the patient and providing appropriate medication by a qualified and competent professional is referred to as "community pharmacy".¹⁷ Community pharmacy performs a beneficial, and social welfare maximising, function within the Australian health care system.

A restriction such as s 25 within a liberal social and economic system should be implemented if it improves social welfare. For example, in *Chappuis v Filo* (at 498-501) Kirby P noted that the requirements of s 25 of the Act

include most obviously the undesirability of non-pharmacists having an interest in what is essentially an individualistic, professional activity for which special education and training are necessary. Pharmacists are entrusted by the community with possession of dangerous and addictive drugs, precisely because they now not merely supervise the business of a pharmacy (as under the old law) but reserve an exclusive interest in its financial operation, subject to very strictly defined exceptions.

Within a free-market system, health care professionals, such as pharmaceutical providers, necessarily seek to make a profit.¹⁸ Counsel for the plaintiff in *NPL* observed (at [41]) that s 25 of the Act creates a "capitalist" connection of pharmaceutical business to registered pharmacists.

In determining the social welfare impacts of establishing the capitalist connection to registered pharmacists, and as a corollary preventing non-pharmacists from conducting pharmaceutical businesses, we should evaluate according to the ethical health care principles of autonomy,

¹⁴ Benrimoj S and Frommer M, "Community Pharmacy in Australia" (2004) 28 *Australian Health Review* 2.

¹⁵ Commonwealth of Australia and Pharmacy Guild of Australia, *The Fourth Community Pharmacy Agreement* (2007) at [33.1d].

¹⁶ Pharmacy Guild of Australia, *Fact Sheet: Community Pharmacy* (March 2009).

¹⁷ Commonwealth of Australia and Pharmacy Guild of Australia, n 15.

¹⁸ Benrimoj C, *Cost-Benefit Analysis of Pharmacist Only (S3) and Pharmacy Medicines (S2) and Risk-Based Evaluation of the Standards, Final Report* (Commonwealth of Australia, 2005).

beneficence, nonmaleficence and justice.¹⁹ According to the *Fourth Community Pharmacy Agreement*, “community pharmacy is an integral part of the infrastructure of the health care system in its role in primary health care through the delivery of the PBS and related services”.²⁰ Benrimoj and Frommer note that there is potential for “community pharmacy to make a major contribution to the implementation of health policy through health promotion and primary, secondary and tertiary prevention”.²¹ However, similar to most licensing schemes, community pharmacy has nevertheless been criticised as it creates barriers to entry for possible suppliers in the pharmaceutical business market. Therefore, it is argued, it does not allow the market to provide a competitive outcome. For example, Corones quoted Woolworths’ claims about consumers currently paying 25% higher prices, and contends that removing the barriers to entry into the pharmaceutical industry means that there will be lower prices.²²

However, this assumes that allowing the entry of what are effectively two Australian supermarket chains will increase competition from the current system which has established 5,000²³ separate community pharmacies, and furthermore, that these supermarket chains will not overpower the market.

Actually, creating a capitalist connection between non-pharmaceutical entities and the “business of a pharmacy” would support rent-seeking, and may compromise the ethical and competent provision of health care. As Wilson argues, corporatisation of the health care system has led to fraud, over-servicing and privacy concerns.²⁴

Furthermore, removing the community aspect in the “business of a pharmacy” is likely to degrade the quality of health care in Australia. According to Leeder:

There is a very big shift in the way in which we provide health services in this country, and there is an increasing presence of big business interests in health care provision, which really challenges some of the fundamental social values like equality.²⁵

The Act merely ensures that pharmaceutical services are provided by a competent and educated registered pharmacist. The Act does not distort any financial or retail aspect of non-health care provision.

The Galbally Review evaluated the social benefits in licensing the “business of a pharmacy” to pharmacists only, and found that opening up these licences to non-pharmacists would incur significant social costs that would outweigh any possible price benefits.²⁶ The Review highlighted that there are significant risks posed not only by particular drugs but in relation to particular persons, and therefore that it is necessary to have community pharmacy counselling services.²⁷

The counselling service provided by community pharmacies allows the consumer to make decisions, based on information from a competent, educated source – the registered pharmacist. The education and experience of a registered pharmacist exposes them to tort liability and to professional

¹⁹ Beauchamp T and Childress J, *Principles of Biomedical Ethics* (4th ed, Oxford University Press, New York, 1994) Ch 1.

²⁰ Commonwealth of Australia and Pharmacy Guild of Australia, n 15 at [1.1a].

²¹ Benrimoj and Frommer, n 14.

²² Corones S, “Competition Law in Health Care Markets, Some Recent Developments” in “Restrictive Trade Practices” (2004) 32 ABLR 294.

²³ Pharmacy Guild of Australia, *Fact Sheet: Community Pharmacy* (March 2009).

²⁴ Wilson B, “Health Systems, Quality Control and Corporatisation: New Challenges for Accountability” in Freckelton I and Petersen K (eds), *Disputes and Dilemmas in Health Law* (Federation Press, Sydney, 2006).

²⁵ ABC Radio National, *Health Report* (27 August 2001).

²⁶ Galbally R, *National Competition Review of Drugs, Poisons and Controlled Substances Legislation. Final Report A* (Commonwealth of Australia, 2001) at [5.3.4] (Galbally Review).

²⁷ Galbally Review, n 26, pp 45-46.

conduct rules in the disciplinary context.²⁸ In fulfilling its role, community pharmacy provides appropriate information and medications (beneficence) at the behest of the consumer (autonomy), in a responsible manner (non-maleficence) to all consumers equally, in a competitive manner (justice). Licensing the provision of pharmaceutical business is integral to high-quality service provision.

CONCLUSION

Maintaining the community pharmacy arrangement within the Australian pharmaceutical industry is essential to appropriate maintenance of health care provision in Australia. Retaining legislative prohibitions on the range of permissible pecuniary interests in the “business of a pharmacy” is likely to ensure that pharmaceuticals continue to be provided to patients outside a hospital setting in circumstances that are optimally beneficial, safe and cost-effective.

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²⁸ Hattingh L, Forrester K, Smith N and Searle J, “Pharmacy Practice Developments: The Potential Impact on Pharmacists’ Legal Liability” (2007) 14 JLM 397.